WHAT DOES THE WORD *PREFERENCE* MEAN AS USED IN § 60 B, OF THE BANKRUPTCY ACT? — To constitute a voidable preference under section 60 b of the Bankruptcy Act, the transfer must have been made under conditions giving the creditor "reasonable cause to believe that . . . such . . . transfer would effect a preference." [1] A recent federal case in New York [2] holds that the creditor has not such reasonable cause although he knew the bankrupt to be insolvent, provided he thought the bankrupt would probably again become solvent. The court gives two descriptions of the test to be applied, which are difficult to reconcile. It first [3] says, "The only test is the honesty of his purpose;" and then, a few lines below, "the test should be whether the chance was one whose success good judgment would forecast." The first suggestion takes a subjective standard and allows an optimist to retain property that a pessimist could not; while the second, and it would seem the better, adopts an objective standard. There is one line of reasoning that leads to holding both tests clearly wrong as applied to the principal case, on the ground that the transfer at the moment it was made was then and there a preference and that the creditor did not suspect but knew it to be such.

In determining what is meant by a preference in section 60 b, there is no doubt but that section 60 a should control,[4] its apparent purpose being to define. Section 60 a, as amended in 1903, reads in part: "A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition*, . . . made a transfer of any of his property, and the effect of . . . such . . . transfer[5] will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." In the principal case the debtor, while insolvent, transferred property to a creditor by way of security,[6] that is, for the express purpose of enabling the creditor to obtain a greater amount of his debt. All these facts were actually *known* to the creditor, and they present every element of a preference with one seeming exception, namely, that the transfer was made "within four months before the filing of the petition." This fact the creditor obviously could not know. But, it is submitted, this fact should not be considered an element of a preference.

Prior to 1903 there was no doubt but that the transfer at the moment it was made constituted a preference irrespective of the time it oc-

[1] Prior to 1910 this section required that the creditor have "reasonable cause to believe that it was intended thereby to give a preference." While the change in 1910 obviously changed the elements of a voidable preference, there is no ground for holding that it affected the meaning of the word "preference" as used in the clause in question. It follows that the arguments advanced below apply equally, *mutatis mutandis*, to cases arising between 1903 and 1910.

[2] Kennard *v.* Behrer, 46 A. B. R. 70 (Dist. Ct. N. Y.) (1920). For a statement of the facts in this case, see RECENT CASES, p. 552.

[3] See Kennard *v.* Behrer, *supra*, 74.

[4] See *In re* F. M. & S. Q. Carlile, 199 Fed. 612, 617 (1912).

[5] The full text of this part of the section is: " . . . and the effect of the enforcement of such judgment or transfer will, etc." Since it is hard to see what is meant by the enforcement of a transfer, the word "enforcement" may more reasonably be taken to refer exclusively to the word "judgment."

[6] By § 1 a (26), the word "transfer" is defined as including a transfer by way of pledge.

curred,[7] for until that year section 60 a contained no preference to the four months' period.[8] Did the amendment in 1903 add a new and substantial element to a preference and thus postpone its final determination until the filing of the petition? The leading textbook on the subject is by no means clear that it did.[9] Several courts, since the amendment, have used language entirely inconsistent with such a view.[10] But the strongest arguments can be drawn from the Act itself. Section 60 b was amended in 1910 and the present version contains the words, "if at the time of the transfer . . . the judgment or transfer *then* operate as a preference." The framers of this clause cannot have regarded a preference as something only determinable by later events. Again, the fact that section 60 a refers to "the" petition indicates strongly that the framers were looking back at the transaction as from after the time proceedings had been commenced. To say that the four months' period was intended to operate rather as a statute of limitations in certain cases,[11] than as adding a new element, is a more rational explanation. Finally, section 60 b before the amendment in 1910, required that the creditor have "reasonable cause to believe that it was intended thereby to give a preference." [12] It follows that between 1903 and 1910, if the words in question in section 60 a were taken literally, to avoid a transfer under section 60 b the trustee would have to show that the creditor had reasonable cause to believe that his debtor *intended* that a petition in bankruptcy be filed against him, or by him, within four months. Such a contention is absurd, and does not seem ever to have been made.

An attempt has been made above to support the construction contended for both on the authorities and from the Act [13] itself. An argument on grounds of policy can also be made. It is admitted that the great service rendered by the Bankruptcy Act is in securing an equitable division of the debtor's estate.[14] Under the doctrine of the principal case a creditor can indulge in guessing the future of a debtor whom he knows to be insolvent, and if his guess is approved gain an advantage over other creditors. To prohibit this would lead to a more equitable division of assets, and would also eliminate *pro tanto* the unfortunate element of the debtor's and creditor's respective beliefs and intentions, which has led to much confusion.[15] In short, if the creditor had reasonable cause to believe the debtor insolvent, the transfer should be voidable.[16]

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[7] *In re* Jones, 4 A. B. R. 563 (Dist. Ct. Mass.) (1900). See *In re* Steers Lumber Co., 110 Fed. 738 (1901). [8] See 30 STAT. AT L. 562.

[9] See REMINGTON ON BANKRUPTCY, 2 ed., 1215.

[10] See Coder *v.* Arts, 213 U. S. 223, 241 (1909); Lazarus *v.* Eagan, 206 Fed. 518, 522 (1912); Van Iderstine *v.* Nat'l Discount Co., 227 U. S. 575, 582 (1913).

[11] And even for this purpose the words are unnecessary in § 60 a. For §§ 60 b and 67 e both contain express four-month limitations, and § 57 g refers only to transfers voidable under those two sections. [12] See 32 STAT. AT L. 800.

[13] It is fair to note that the words "would effect a preference" § 60 b, seem to look to the future. But, on the other hand, they may be explained by the fact that every effect is naturally thought of as following its cause, if only by a moment.

[14] See *In re* Leslie, 119 Fed. 406, 410 (1903). See 1 REMINGTON ON BANKRUPTCY, 2 ed., 15 *et seq.*

[15] For some conflicts of authority see the opinion in Kimmerle *v.* Farr, 189 Fed. 295 (1911).

[16] This would constitute virtually a return to the rule adopted in the statute of 1867.

RIGHTS OF UNBORN CHILDREN IN THE LAW OF TORTS. — The child *en ventre sa mère* is far from a nonentity.[1] His status both in criminal law[2] and in the law of property[3] is established. But it is equally well established that the reason he may be the object of homicide is not because he is capable of individual rights, but only because of the state's interest in life, and that the reason he is recognized as a person in property depends on special property rules.[4] There is no basis, in either case, from which to draw an analogy in determining the problem whether a child may have a right of action in tort for prenatal injury.

Despite broad statements in decisions to the effect that "to all intents and purposes" the child *en ventre sa mère* is a living person,[5] and despite the favor with which eminent text-writers regard the existence of this right,[6] no action brought by a child in the past for prenatal injury has progressed beyond the demurrer stage.[7] Nor has the child's right obtained better recognition when its administrator has sued under statutes similar to Lord Campbell's Act.[8] Yet, at the same time, the courts have acknowledged that there is a residuum of damage which cannot be accounted for at the suit of either of the child's parents.[9]

It has been said by one writer that there is a recognized duty to abstain from injuring the unborn child quite apart from the duty not to injure the mother,[10] and by a second that every person has a right to bodily integrity at birth.[11] But neither theorist will accord the infant his right of action, the former declaring that there is not for every duty a corresponding right and the latter pleading inexpediency. The novelty of such an action leads a third writer to conclude that only by legislative intervention can the residuum of damage be accounted for.[12] But the statutory solution is easier recommended than obtained. The Japanese Code deems a child *en ventre sa mère* already born with regard to claim-

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See 14 STAT. AT L. 534. The view that such a return would lead to more debtors being forced into bankruptcy by creditors who cannot rely on security given by the debtor, is unsound. For if the creditor honestly thinks the debtor's chances of becoming solvent are good, it would be very foolish to demand a dividend in bankruptcy when forbearance may lead to being paid in full.

[1] "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." Buller, J., in Thellusson *v.* Woodford, 4 Ves. 227, 321 (1799).

[2] See 13 HARV. L. REV. 521.

[3] See 20 HARV. L. REV. 651.

[4] See 12 HARV. L. REV. 209.

[5] Per Lord Hardwicke in Wallis *v.* Hodson, 2 Atk. 114, 116 (1740). See also Groce *v.* Rittenberry, 14 Ga. 232, 237 (1853).

[6] See SALMOND, LAW OF TORTS, 5 ed., 394; 1 BEVEN, NEGLIGENCE, 3 ed., 75.

[7] See Walker *v.* Great Northern Ry. Co. of Ireland, 28 L. R. Ir. 69 (1891); Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367 (1913); Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Dietrich *v.* Northampton, 138 Mass. 14 (1884).

[8] Gorman *v.* Budlong, 23 R. I. 169, 49 Atl. 704 (1898); Buel *v.* United Rys. Co., 248 Mo. 126, 154 S. W. 71 (1913).

[9] See Prescott *v.* Robinson, 74 N. H. 460, 463, 69 Atl. 522, 524 (1908); Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 668, 139 N. Y. Supp. 367, 368 (1913).

[10] See MARKBY, ELEMENTS OF LAW, 4 ed., § 132.

[11] See 15 HARV. L. REV. 313.

[12] See 1 UNIV. OF MO. BULL. 42.